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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANDRES L. LUNA, Defendant and Appellant.	B278454 (Los Angeles County Super. Ct. No. BA271066)

APPEAL from a judgment of the Superior Court of Los Angeles County, David M. Horwitz, Judge. (Retired Judge of the Los Angeles Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed and remanded, with directions.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and Michael J. Wise, Deputies Attorney General, for Plaintiff and Respondent.

Defendant Andres L. Luna appeals an order denying his second petition to reduce his 2004 felony conviction for receiving stolen property (Pen. Code, § 496, subd. (a))[1] to a misdemeanor pursuant to Proposition 47 (§ 1170.18, subd. (f)).[2] The trial court denied defendant's first petition on the erroneous basis that defendant was ineligible for relief due to his later conviction for vehicular manslaughter under section 192, subdivision (c)(1). We affirmed the trial court's order without prejudice to defendant submitting a new petition on the alternative ground that defendant failed to

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[1] All future statutory references are to the Penal Code unless otherwise specified.

[2] The record is meager in this case. The Clerk of the Superior Court certified that she is unable to locate the 2004 court file. As a result, the record lacks the information, preliminary hearing and plea transcripts, and police and probation reports. The appellate record does contain the felony complaint, minute orders on the case from 2004, defendant's section 1170.18 petition, and the minute order of the court's decision. We conclude the record is adequate to resolve the issues presented.

allege or provide any evidence that the value of the stolen property did not exceed $950, as required to establish eligibility under section 1170.18. (*People v. Luna* (Apr. 18, 2016, B267976 [nonpub. opn.]).) Defendant filed a second Proposition 47 petition, this time attaching his signed declaration describing the stolen items and estimating their worth as approximately $450. The trial court denied the petition because it found "[t]here is no indication the value of the property was less than $950.00."

Defendant contends that he submitted evidence sufficient to establish prima facie eligibility for reclassification of his felony conviction. He further contends that he was denied his right to due process because he was neither present at the hearing[3] nor represented by counsel, despite his request that counsel be appointed.

We agree that defendant has met his initial burden of establishing eligibility. We need not address his claim concerning the trial court's failure to appoint counsel, as we will direct the court to appoint counsel upon remand.

DISCUSSION

Under Proposition 47, a felony conviction for receiving stolen property may be reduced to a misdemeanor where, as here, the value of the stolen property does not exceed $950, and the petitioner has no prior convictions for an offense

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[3] Defendant was incarcerated at the time of the hearing.

specified in section 667, subdivision (e)(2)(C)(iv) or for an offense requiring registration pursuant to section 290, subdivision (c). (§§ 496, subd. (a); 1170.18, subds. (f)–(i).) "The ultimate burden of proving section 1170.18 eligibility lies with the petitioner. (See Evid. Code, § 500.) In some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility. When eligibility is established in this fashion, 'the petitioner's felony sentence shall be recalled and the petitioner sentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).) But in other cases, eligibility for resentencing may turn on facts that are not established by either the uncontested petition or the record of conviction. In these cases, an evidentiary hearing may be 'required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.' (Cal. Rules of Court, rule 4.551(f); see also *People v. Sherow* (2015) 239 Cal.App.4th 875, 880 [(*Sherow*)] ['A proper petition could certainly contain at least [the petitioner's] testimony about the nature of the items taken. If he made the initial showing the court can take such action as appropriate to grant the petition or permit further factual

determination.'].)" (*People v. Romanowski* (2017) 2 Cal.5th 903, 916 (*Romanowski*).)

Procedural History

Defendant utilized the Superior Court of Los Angeles County form, which allows a petitioner for reclassification to request a hearing although "not necessary." Defendant checked a box indicating that he desired a hearing, and typed in a request for appointment of counsel. His attached brief alleged the stolen automobile parts he received included only "the rear seating, which consist [*sic*] of the bottom seat cushion and the back rest cushion, and . . . the rear speaker covers" rather than "vehicle seats" and "interior vehicle-trim [*sic*]" alleged in the felony complaint. Petitioner attached several documents in support of the petition, including a declaration, signed under penalty of perjury, in which he stated:

"I plead [*sic*] no contest to violating Penal Code [section] 496[, subdivision] (a). [¶] As such, I received and was in possession of the rear seating cushions, and the rear speaker covers, which I installed on my 1990 Honda Accord, with an estimated total value of $450. [¶] I had full knowledge that the rear seating custions [*sic*] and the rear speaker covers were stolen from another 1990 Honda Accord when I installed them in my vehicle. [¶] The total value of the rear seating cushions and the rear speaker covers <u>does not exceed 950 dollars</u>."

The record does not contain a written opposition to the petition, nor is it alleged that the prosecution filed an opposition with the court. However, the minute order indicates that the prosecution opposed the petition. The reporter's transcript reflects that a prosecutor appeared at the hearing, but made no argument.

At the hearing, the court summarily denied the petition, stating only:

"Motion is denied.

"There is no indication the value of the property was less than $950.00."[4]

Defendant timely appealed.

Analysis

The trial court's ruling that defendant presented no new evidence in connection with his second Proposition 47

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[4] The explanation of the trial court's ruling in the minute order is more detailed. It states: "The defendant has failed to prove the value of the property in count 2, section 496[subdivision](a) of the Penal Code is less than $951.00 defendant has not provided any additional proof/information than he did when he first sought relief under Proposition 47. See page 5 of the appellate court opinion regarding defendant's appeal from the initial denial. The appellate court noted that defendant failed to meet his burden. [¶] Defendant has not provided any new evidence since then. [¶] The court denies the re-newed application for reduction to a misdemeanor pursuant to Proposition 47."

petition is not correct. Defendant's first Proposition 47 petition was not supported by a declaration regarding the value of the property. Defendant's second petition included his signed declaration, which describes the stolen property as rear seating cushions and rear speaker covers from a 1990 Honda Accord with an estimated value of $450. The declaration indicates that defendant "had" a 1990 Honda Civic and that the stolen seats were installed in his vehicle. This is prima facie evidence of the value of the stolen property. "The opinion of an owner of personal property is in itself competent evidence of the value of that property, and sufficient to support a judgment based on that value. (See *Golding v. R.K.O. Pictures, Inc.* (1950) 35 Cal.2d 690, 700–701; Witkin, Cal. Evidence (2d ed. 1966) § 403 and cases there cited.)" (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921.)

At the initial pleading stage, declarations may stand in for the testimony a petitioner would give at a hearing.[5] (See

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[5] The Attorney General relies on the following language in *People v. Sweeney* (2016) 4 Cal.App.5th 295, 302 (*Sweeney*), to argue otherwise: "Simply alleging that the petitioner 'believes' the property was worth $950 or less is not enough, even if the petition is under penalty of perjury. '"An affidavit based on 'information and belief' is hearsay and must be disregarded." [Citation.]' (*Baustert v. Superior Court* (2005) 129 Cal.App.4th 1269, 1275, fn. 5.) Rather, the petitioner must 'indicate . . . the factual basis of his claim regarding the value of the stolen property.' ([*People v.*] *Perkins* [(2016) 244 Cal.App.4th 129,] 137.)" *Sweeney* is

Sherow, *supra*, 239 Cal.App.4th at p. 880 [proper petition could contain at least declaration from defendant attesting to value of stolen property]; *Perkins*, *supra*, 244 Cal.App.4th at p. 140 [same].) Nothing in the record on appeal indicates the basis for the prosecution's opposition, and there is no evidence to suggest that the stolen property had a value greater than $950. Under these circumstances, the record does not support affirming the order on the basis that defendant failed to carry his prima facie burden.

The petition in this case is the type described in *Romanowski*, *supra*, where "eligibility for resentencing . . . turn[s] on facts that are not established by either the uncontested petition or the record of conviction," necessitating an evidentiary hearing if the petition is opposed. (*Romanowski*, *supra*, 2 Cal.5th at p. 916.) Accordingly, we reverse and remand for further proceedings. (*Ibid.*)

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readily distinguishable, however, because the defendant did not submit a declaration under penalty of perjury. He filed a form petition that included a checked box indicating the value of the stolen property did not exceed $950, which was signed *by his attorney* under penalty of perjury. No evidence was submitted in support of Sweeney's petition.

DISPOSITION

The order denying defendant's petition for reclassification of his felony conviction to a misdemeanor under section 1170.18 is reversed. If the District Attorney contests defendant's initial showing of eligibility, the trial court is directed to conduct an evidentiary hearing to determine whether defendant has met his ultimate burden. The trial court is directed to appoint counsel to assist defendant if he cannot afford counsel of his own choosing.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KUMAR, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.